In the Supreme Court of the United States

OCTOBER TERM, 1967

PUBLIC SERVICE COMMISSION OF THE STATE OF WISCONSIN AND CITY OF CHICAGO, A MUNICIPAL CORPORATION OF THE STATE OF ILLINOIS, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 19–46) is not yet reported. The opinions of the Federal Power Commission (Pet. App. G, 68–83; App. H, 84–91) are reported at 33 F.P.C. 574, 1277.

JURISDICTION

The judgment of the court of appeals was entered September 8, 1967. By order entered October 31, 1967 (Pet. App. B, 47), the court of appeals granted petitioners' motion for stay of transmittal of the opinion and certified copy of its judgment in case No. 19604 for 30 days and denied the petition of Natural Gas

288-663—68

Pipeline Company of America for rehearing in case No. 19836. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether Section 4(e) of the Natural Gas Act, or a Commission-approved settlement agreement among the parties, required the Federal Power Commission to order the Natural Gas Pipeline Company of America to make refunds as a result of a change in the Commission's policy—regarding the computation of the allowance of federal income taxes in the Company's rates—effective as of the date when Natural began to collect, subject to refund, the rates based on the pre-existing policy, rather than as of the later date on which the policy change was first announced to the industry.

STATUTE INVOLVED

Section 4(e) of the Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 882, 15 U.S.C. (1958 ed.) 717c(e), is set forth in the petition, App. C, 50–52.

STATEMENT

On August 29, 1960, Natural Gas Pipeline Company of America, pursuant to Section 4(d) of the Natural Gas Act, filed with the Federal Power Commission a schedule of increased rates.[1] The Commission sus-

[1] The rate increases were filed by Natural and by Peoples Gulf Coast Natural Gas Pipeline Company. The two companies were combined on September 29, 1960, and will be referred to herein solely as "Natural."

pended these rates under Section 4(e) of the Act for the maximum statutory period of five months. Subsequently, on March 1, 1961, Natural put the rates into effect, subject to its obligation to refund such revenues derived from the new rates as the Commission might subsequently find unjustified.

Before the hearing examiner issued his decision, Natural entered into a settlement agreement with other parties, including petitioners (J.A. 291–305), which the Commission approved (Pet. App. E, 63). This agreement resolved most pending questions. It reduced the proposed increases in rates by about half and Natural undertook to refund the excess collected.

The settlement reserved for future Commission determination, *inter alia,* an issue regarding the federal tax allowance to be included in Natural's cost of service. Natural agreed, if this issue should be decided against it, to make further refunds, with interest, of "such excess payments, as shall result from the reduction, if any, in the level of any of the rates contained in its FPC Rate Schedules that may be required by the Commission at the time of such order * * *" (Pet. App. F, 67).

The tax issue grew from Natural's practice of reducing its tax liability by taking liberalized depreciation, but, under the then effective Commission policy, including in its costs for rate purposes the higher taxes that would have resulted from taking straight-line depreciation, and setting aside in a deferred tax reserve the difference between this "normalized" tax and the actual tax paid. Chicago contended that the Commission should change its policy and require

pipeline companies to "flow through" the tax advantages of liberalized depreciation by including in costs only the taxes actually paid.

The Commission had indicated, prior to the settlement agreement, that it was reconsidering the tax question.[2] On June 1, 1962, it ordered oral argument on that issue in *Alabama-Tennessee Natural Gas Co.* and invited *amicus* participation by anyone having an interest in the problem. 27 F.P.C. 1063. On February 3, 1964, the Commission announced as its new general policy that "flow-through" was the proper method of computing federal income tax allowances for rate making purposes. *Alabama-Tennessee Natural Gas Co.*, 31 F.P.C. 208. The same issue had been reserved in orders prescribing future rates for other companies; the Commission said that as to them the *Alabama-Tennessee* decision would constitute a proposed decision. 31 F.P.C. at 209.

Thereafter Chicago moved the Commission to decide the issue as to Natural. Natural, in its answer (J.A. 366–377), offered to accept the Commission's decision in *Alabama-Tennessee* if it were judicially affirmed,[3] provided that refunds on that account would be made only for a period beginning October 1, 1965, and only if Natural had not before that date elected to abandon

---

[2] See *Idaho Power Company*, 27 FPC 349, 352; *Minnesota Power & Light Company*, 27 FPC 354, 357; *Southern California Edison Company*, 27 FPC 360, 363; *New England Power Company*, 27 FPC 404, 406; and *California Electric Power Company*, 27 FPC 658, 662.

[3] The Fifth Circuit affirmed the Commission on March 25, 166 (359 F. 2d 318), and certiorari was denied on October 10, 1966 (385 U.S. 847).

use of liberalized depreciation (J.A. 373–375). Chicago and the other petitioner here, the Wisconsin Public Service Commission, urged rejection of Natural's proposal on the ground, *inter alia,* that, under the settlement agreement, the refunds should date back to March 1961.

The Commission, in Opinion No. 456 (Pet. App. G, 68–83), held that the principles of *Alabama-Tennessee* were applicable to Natural, and ordered Natural to make refunds for the period beginning February 3, 1964, the date of the *Alabama-Tennessee* decision (Pet. App. G, 77). On rehearing the Commission denied both Natural's claim that October 1, 1965 (J.A. 433–434), and petitioners' claim that March 1, 1961 (J.A. 411–412), should begin the refund period (Pet. App. H, 90). The Court of Appeals for the District of Columbia Circuit unanimously affirmed on this issue (Pet. App. A, 38–46).[4]

ARGUMENT

The petition presents no issue of general import. The narrow question of the interpretation of a particular settlement agreement such as the one involved here does not warrant plenary review by this Court. Nor is there merit to the contention that the Commission has no discretion to order refunds from a date

[4] The court affirmed the Commission's decision to reflect only actual federal income taxes in Natural's rates (Pet. App. A, 21–33). It reversed, however, the Commission's decision requiring the reduction of Natural's rate base by the accumulated deferred tax reserve on the ground that that issue was not reserved for future determination by the Commission-approved settlement agreement. The court's decision in these respects is not at issue here.

later than the effective date of rates collected subject to refund.

1. "Normalization" was the lawful and proper method of computing federal income taxes for rate-making purposes until the Commission changed its policy on February 3, 1964. See, *e.g.*, *El Paso Natural Gas Co.* v. *Federal Power Commission*, 281 F. 2d 567, 573–574 (C.A. 5), certiorari denied, *sub nom. California* v. *Federal Power Commission*, 366 U.S. 912. So long as the old policy remained in effect rates based thereon were lawful rates. The "flow-through" policy represented a significant change in the policies that determine rates.

Section 4(e) of the Act provides that the Commission "may" order the refund of "the portion of such increased rates or charges by its decision found not justified." There is no basis for reading into this permissive language, as petitioners would, a command to apply the same rate throughout the refund period. The only proper question is whether the Commission acted reasonably in selecting an intermediate date for the start of refunds resulting from this general change of policy. Here the Commission's decision was to make a fundamental change in policy prospective from the date it was first announced. Surely it was not unreasonable to attempt in this way to be as even-handed as the circumstances allowed in the treatment accorded the various members of a single industry.

2. As the court below and the Commission found, nothing in the agreement committed Natural to make, or the Commission to order, refunds back to March 1, 1961, if the Commission determined that flow-through

was the appropriate treatment of the use of liberalized depreciation (Pet. App. G, 74). The agreement merely provided, and did so expressly, that Natural would make such further refunds of the increased rates put into effect on March 1, 1961, as would result from a reduction in the level of rates required by the Commission in its order deciding the "flow through" question (Pet. App. F, 67). This left it to the Commission to decide that issue and the date as of which, as a matter of regulatory policy, flow-through, if that should be required, should be made applicable to Natural. As the court of appeals correctly found, the agreement of the parties "did not purport to fetter the Commission's discretion to make its decision prospective" (Pet. App. A, 45–46).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
PETER H. SCHIFF,
Solicitor,
ABRAHAM R. SPALTER,
Assistant General Counsel,
ISRAEL CONVISSER,
CYRIL S. WOFSY,
Attorneys,
Federal Power Commission.

JANUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968